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No. 90-1191

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

OPERATING ENGINEERING & PARTICIPATING EMPLOYERS PRE-APPRENTICE, APPRENTICE AND JOURNEYMAN AFFIRMATIVE ACTION TRAINING FUND, AND THE OPERATING ENGINEERS JOINT APPRENTICESHIP COMMITTEE FOR NORTHERN CALIFORNIA,

Petitioners,

vs.

WEISS BROS. CONSTRUCTION CO., dba WEISSCAL, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

An ERISA employee benefit plan was created as a result of a collective bargaining agreement. The plan establishes an apprenticeship training program and requires signatory employers to adhere to the program and to contribute to an ERISA apprenticeship fund.

Does ERISA's express preemption of "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" supersede a state law that seeks to coerce nonsignatory employers into complying with the ERISA plan and contributing to the ERISA fund?

LIST OF AFFILIATED CORPORATIONS

Weiss Brothers Construction Company, Inc., dba Weisscal Company, has no parents, subsidiaries, or affiliates.

Fidelity and Deposit Company of Maryland has no affiliates. Its parents and subsidiaries are Swiss Reinsurance Company, Zurich Insurance Company, and Fidelity and Deposit Company.

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INTRODUCTION

Respondents Weiss Brothers Construction Co., Inc., dba Weisscal Company, David Weiss, Allen Weiss, and Fidelity and Deposit Company of Maryland (erroneously sued as Fidelity and Deposit Corporation) (collectively "Weiss") respectfully urge denial of the petition for writ of certiorari brought by Operating Engineers & Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund ("Apprenticeship Training Fund") and the Operating Engineers Joint Apprenticeship Committee for Northern California ("Joint Apprenticeship Committee" or "Committee").

STATEMENT OF THE CASE

The Joint Apprenticeship Committee, created by a collective bargaining agreement between a labor union and participating employers, promulgates apprenticeship standards for operating engineers. The standards govern an apprenticeship training program. Participating employers who are signatories to the collective bargaining agreement are obligated to comply with the Committee's standards and to contribute to the Apprenticeship Training Fund.

Weiss is not a participating employer and is not a party to the collective bargaining agreement. In 1985, Weiss was awarded a California public works contract. California Labor Code section 1777.5 provides that if a contractor who has been awarded a public works contract employs workers in an apprenticeable trade, the contractor must apply to the joint apprenticeship committee for a

certificate of approval. A contractor can obtain a certificate of approval by signing a "DAS 7" form prepared by the State of California Department of Industrial Relations.

Weiss, as it was required to do by section 1777.5, signed a DAS 7 form. The Joint Apprenticeship Committee also signed the form. As the project progressed, a dispute arose between Weiss and the Committee as to whether Weiss was complying with the apprenticeship training program and making the required contributions to the Apprenticeship Training Fund.

Petitioners sued Weiss in a California Superior Court for breach of contract. The "contract" was alleged to be the State's DAS 7 form. (Here, petitioners appear to assert that their breach of contract claim was based on the contract between the public entity and Weiss. (Petition at 6.) This assertion was never made in the California courts; the only alleged breach of contract pertained to the DAS 7 form.) Petitioners sought unpaid contributions to the Apprenticeship Training Fund (they concede in their petition, at page 7, that they do not know how much, if any, remains unpaid) and money damages for unpaid wages for apprentices that were not hired.

Weiss demurred to the complaint on the ground of ERISA preemption. Before the demurrer was heard, petitioners filed an amended complaint. Weiss again demurred. The trial court sustained the demurrer, ruling that petitioners' claims were preempted by ERISA, and dismissed the amended complaint. Petitioners filed a motion for reconsideration, submitting a proposed second amended complaint, which was denied.

A unanimous panel of the California Court of Appeal upheld the trial court's decision. (*Operating Engineers & Participating Employers etc. Fund v. Weiss Bros. Construction Co.*, 221 Cal.App.3d 867 (1990).) The California Supreme Court denied petitioners' request to review the Court of Appeal's decision.

REASONS FOR DENYING THE WRIT

A. NO IMPORTANT FEDERAL QUESTION IS PRESENTED

This case involves a California statute. The California courts have analyzed the statute in light of federal statutory and decisional law and have held that, to the extent it seeks to coerce nonsignatory employers to comply with an ERISA plan and contribute to an ERISA fund, the California statute is preempted by the express terms of ERISA. They have further held that the ERISA fund cannot evade ERISA's explicit preemption provisions by the simple expediency of filing a common law claim in a state court.

The highest court in California has refused to disturb the decision of the California Court of Appeal. This Court has declined to review a decision of the United States Court of Appeals for the Ninth Circuit, in a case indistinguishable from the present case on any relevant basis, interpreting the same California statute, and reaching the same preemption conclusions. (*Hydrostorage, Inc. v. Northern Cal. Boilermakers*, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 72, 112 L.Ed.2d 46 (1990).) The Ninth Circuit affirmed a district court decision that

also held section 1777.5, in the circumstances of this case, is preempted by ERISA. (*Hydrostorage, Inc. v. Northern Cal. Boilermakers*, 685 F.Supp. 718 (N.D. Cal. 1988).)

The decisions of the California courts and the federal courts that have examined the California statute are in complete harmony. The issue is settled in California, and settled in a fashion consistent with the express terms of ERISA and the decisions of this Court. Contrary to petitioners' assertion (Petition at 2-3), the issue is not destined to haunt the Court until it finally breaks down and grants review.[1]

The decision of the California Court of Appeal does not construe federal law in any new or unusual manner. To the contrary, it adopts the constructions employed by

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[1] Petitioners' contention that the district court decision in *Boise Cascade Corp. v. Peterson*, 735 F.Supp. 1434 (D.Minn. 1990) conflicts with *Hydrostorage* and *Operating Engineers* (Petition at 3 n.l) is wrong by a wide margin. *Boise* involved an administrative rule requiring a minimum apprentice-journeyman ratio at all jobsites where high pressure pipefitting was performed. (*Id.* at 1435.) The rule was adopted as a public safety measure because of the "danger posed by improperly installed high pressure piping." (*Id.* at 1437.) Because it was "a law of general application which applies to any jobsite where high pressure pipefitting is done" and *"does not require any employers to create or fund an ERISA plan nor does it affect any other primary administrative functions of ERISA"* (*Id.* at 1439, emphasis supplied), the district court found that the rule, which is not remotely similar to section 1777.5, was not preempted. *Boise* stands in sharp contrast to the facts here, where a nonsignatory employer is required by statute to contribute to an ERISA fund and comply with an ERISA plan. The district court's decision in Boise is on appeal to the United States Court of Appeals for the Eighth Circuit.

this Court and the federal courts of appeals, and, in light of these constructions, holds that a state law is preempted. California application of settled federal principles to a California statute does present an important federal question.

B. THE DECISION OF THE CALIFORNIA COURT OF APPEAL WAS CORRECT

1. Labor Code Section 1777.5, Under The Circumstances Of This Case, Is Preempted By ERISA

Petitioners concede that the Apprenticeship Training Fund is an ERISA fund. (Petition at 4.) They also concede that the standards promulgated by the Joint Apprenticeship Committee govern an apprenticeship training program. (*Ibid.*)

The Employee Retirement Income Security Act was enacted to regulate employee benefit plans on a national scale. (12 U.S.C. §1001.) Employee benefit plans are statutorily defined to include "any plan, fund, or program" established by an employer and a labor union to establish or maintain "apprenticeship or other training programs." (12 U.S.C. §1002.)

The Ninth Circuit gave effect to this plain statutory language, holding that an apprenticeship training program established by a joint apprenticeship committee, and the committee's governing standards, constitute an employee benefit plan. (*Hydrostorage*, 891 F.2d at 725-726.) The California Court of Appeal agreed. (*Operating Engineers*, 221 Cal.App.3d at 877, 879.)

"ERISA contains a very broad preemption clause. Section 514(a) of ERISA, as codified at 29 U.S.C. §1144(a), provides what ERISA 'shall supersede any and all state laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title. . . . ' 29 U.S.C. §1144(a) (emphasis added). 'State laws' are defined as 'all laws, decisions, rules, regulations, or other state action having the effect of law, of any state.' 29 U.S.C. §1144(c)(1). A 'state' is defined as 'a state, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans, covered by this subchapter.' 29 U.S.C. §1144(c)(2)." (*Hydrostorage*, 891 F.2d at 726.)

The Court recently noted the sweeping nature of ERISA preemption:

> The pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that "relates to" an employee benefit plan governed by ERISA.

(*FMC Corporation v. Holliday*, 498 U.S. ___, 112 L.Ed.2d 356 (1990).)

Thus, Labor Code section 1777.5 is preempted to the extent it "relates to" and "purports to regulate," even indirectly, the Joint Apprenticeship Committee's standards and apprenticeship training program. "We made plain in *Shaw v. Delta Air Lines, supra*, that a law relates to an employee welfare plan if it has 'a connection with a reference to such a plan' . . . We based our reading in part on the plain language of the statute. Congress used the words " 'relate to' " in § 514(a) . . . in their broad sense'

. . . . It did not mean to pre-empt only state laws specifically designed to affect employee benefit plans. . . . [Limited pre-emption clauses] were rejected in favor of the present language in the Act, 'indicating that the section's pre-emptive scope was as broad as its language.' " (*FMC Corporation v. Holliday, supra.*)

Section 1777.5 requires nonsignatory employers to apply to joint apprenticeship committees for approval. "The very purpose of requiring [the employer] to apply was so that [the employer] would become bound by the standards, an ERISA plan. . . . Thus, the order [requiring compliance with section 1777.5] undoubtedly 'relates to' an ERISA plan in the sense that the order has a 'connection with or reference to' the standards." (*Hydrostorage*, 891 F.2d at 730.) Section 1777.5 also "purports to regulate" an ERISA plan:

> Section 1777.5 is aimed at enforcing the terms of an ERISA plan, the Standards, and compelling nonsignatory contractors to join or comply with such plans. The . . . statute is therefore one which is specifically designed to affect employee benefit plans. *See* [*Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825, 108 S.Ct. 2182, 2185, 100 L.Ed.2d 836 (1988)]. ('[W]e have virtually taken it for granted that state laws which are specifically designed to affect employee benefit plans are preempted under §514(a)') (citations and internal quotations omitted).)

(*Hydrostorage*, 891 F.2d at 730.)

Having ruled that section 1777.5 relates to and purports to regulate an ERISA plan, the *Hydrostorage* court found that an order requiring the nonsignatory employer

to comply with the statute "falls within ERISA's preemption clause." (*Id.* at 730.)

If the present action had been permitted to proceed, the principal inquiry would have been whether Weiss had complied with the Joint Apprenticeship Committee apprenticeship training program, an ERISA plan. "Because the court's inquiry must be directed to the plan, this judicially created cause of action 'relates to' an ERISA plan." (*Ingersoll-Rand Co. v. McClendon*, 498 U.S. ___, 112 L.Ed.2d 474 (1990).) It is therefore preempted. (*Ibid.*)

2. Preemption of Labor Code Section 1777.5 Does Not Impair Federal Law

The *Hydrostorage* court also found that section 1777.5, in its effort to compel employers to comply with an ERISA plan they neither negotiated nor adopted, was not saved from preemption on the theory that a finding of preemption would "impair" the Fitzgerald Act, 29 U.S.C. §50. (*Hydrostorage*, 891 F.2d at 730-731.) The "savings clause" of the ERISA preemption statute provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." (29 U.S.C. §1144(d).) The Fitzgerald Act, however,

> merely directs the Secretary of Labor "to formulate and promote the furtherance of labor standards . . . to safeguard the welfare of apprentices" and related objectives. 29 U.S.C. §50. The implementing regulations state that their purpose is "to set forth labor standards to safeguard the welfare of apprentices, and to

> extend the application of such standards by prescribing policies and procedures concerning the registration, for certain federal purposes, [of] acceptable apprenticeship programs." 29 C.F.R. §29.1(b). Thus the regulations relate only to eligibility for federal registration. Neither they nor the Act itself contemplate enforcement mechanisms; section 29.11 merely provides for the voluntary adjustment of complaints before either federal or state agencies. Assuming §1777.5 was adopted in furtherance of the objectives of the Fitzgerald Act, it clearly is not an enforcement mechanism of federal law and to the extent orders under [§1777.5] are preempted by ERISA, federal law is not impaired.

(*Hydrostorage*, 891 F.2d at 731, quoting from the district court's decision, 685 F.Supp. at 722.) The Ninth Circuit adopted the lengthy analysis of the Fitzgerald Act issue conducted by the district court (Honorable William W. Schwarzer, District Judge) (685 F.Supp. at 721-723), which concluded that "[b]y no stretch of the imagination could §1777.5 be considered a state law the preemption of which would impair federal law." (*Id.* at 722.)

Petitioners mischaracterize the legal reasoning of District Judge Schwarzer and Circuit Judge Wallace as "simplistic" and "unnecessarily narrow." (Petition at 20.) Petitioners' contention that preemption would "impair" a "federal-state cooperative scheme" is so vague and overly broad that it is meaningless. 29 U.S.C. §1144(d) prohibits impairment of a law, rule, or regulation of the United States. It says nothing of impairing "schemes" purportedly "contemplated" by federal laws. (Petition at 20.) Petitioners have not and cannot identify any law, rule, or regulation of the United States that is "impaired" by the

ruling that is the subject of the petition. Section 1777.5 is not saved from preemption by 29 U.S.C. §1144.

3. The Clear and Explicit Provisions of ERISA Are Conclusive Evidence of Legislative Intent

The California Superior Court, the California Court of Appeal, the U.S. District Court for the Northern District of California and the U.S. Court of Appeals for the Ninth Circuit have all construed section 1777.5, have analyzed its relation to and regulation of ERISA plans, and have concluded that (1) section 1777.5 *does* relate to and regulate ERISA plans, (2) to the extent it does, the plain, explicit, and unambiguous provisions of ERISA mandate preemption, and (3) such preemption does not impair federal law.

Petitioners urge the Court to ignore the plain language of ERISA on the theory that its application may not be consistent with "congressional purpose." (Petition at 14-17.) Petitioners twice criticize the Ninth Circuit and the California Court of Appeal for employing dictionary definitions in their construction of ERISA, calling this approach "simplistic." (Petition at 9-10, 14 n. 16.) In scolding the California Court of Appeal for using a Black's Law Dictionary definition of "relate" (Petition at 9-10), petitioners apparently refer to the decision's reference to *this* Court's decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), in which Justice Blackmun, writing for a unanimous Court, employed a Black's Law Dictionary definition of the word "relate" in construing ERISA's preemption clause. (*Id.* at 97 n. 16.)

Justice Blackmun's analysis was not simplistic. It was consistent with established principles of statutory construction. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (*Perrin v. United States*, 444 U.S. 37, 42 (1979).) In determining the ordinary and common meaning of words, the Court frequently refers to dictionary definitions. (*See, e.g., Mallard v. U.S. District Court of Iowa*, 490 U.S. 296, 301 (1989).)

> [I]n all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used. Thus absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

(*American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), citations and internal quotations omitted.) "In construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.' " (*Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985), citation omitted.)

- Petitioners do not dispute that they administer an apprenticeship training program, as ERISA uses that term in its definition of an employee benefit plan.

- Petitioners do not dispute that section 1777.5 imposes the terms and conditions of their ERISA plan on nonsignatory employers, and requires nonsignatory employers to contribute to an ERISA trust fund.

- Petitioners cannot rationally dispute that section 1777.5 relates to their ERISA plan and ERISA trust fund.
- Petitioners do not dispute that ERISA preempts state law that relates to an employee benefit plan.
- Petitioners do not dispute that section 1777.5 is a state law or that their superior court breach of contract action seeks a "decision . . . having the effect of law." (29 U.S.C. §1144(c)(1).)

Giving the words of ERISA their common and ordinary meaning, section 1777.5 and petitioners' action to enforce that statute are expressly preempted. Petitioners having identified nothing in the legislative history that suggests Congress did not intend preemption in a case such as this, and Congress having expressly defined "employee benefit plan" to include apprenticeship training programs, the plain statutory language must be regarded as a conclusive expression of legislative purpose. Congress is conclusively presumed to have intended to preempt a state law such as section 1777.5 and state action to enforce such a law. Petitioners discussion of "congressional purpose" (Petition at 14-17), however applicable it may or may not be in other contexts, is plainly irrelevant in a case that falls so squarely within the clear preemptive provisions of ERISA.

Petitioners were not left without a remedy, their assertion to the contrary notwithstanding. (Petition at 8 n. 7.) Petitioners have claimed there was a private contractual agreement (because of the DAS 7 form) between Weiss and the Joint Apprenticeship Committee requiring Weiss to comply with the Committee's apprenticeship

training program. ERISA provides for civil enforcement of its provisions and authorizes federal civil actions seeking damages, equitable relief, and attorney's fees. (29 U.S.C. §1132.) Presumably for some perceived tactical reason, petitioners chose to forego their rights under 29 U.S.C. §1132 and instead brought a prohibited state court breach of contract action. (Despite petitioners' suggestion that "eager" apprentices will recoup "thousands of hours of man-hours of vital apprentice training" if their lawsuit is reinstated (Petition at 3), their complaint was solely for money damages allegedly owed the Apprenticeship Training Fund. This lawsuit never sought to compel Weiss to train apprentices.)

The decision of the California Court of Appeal is correct, well reasoned, and reaches the only possible result consistent with the clear language of ERISA. It is consistent with the conclusions of federal courts confronted with the same federal preemption issue. The issue is correctly settled in California, and there is no split of authority in the circuit courts of appeals. No important federal issue is presented for this Court's review.

CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be denied.

Dated: February 21, 1991.

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